

to customers quickly and with a reduced risk of service interruptions. The use of ILEC UNEs and the UNE platform also makes it possible for competitors to convert large numbers of customers, just as the PIC-change process allows conversion of large volumes of long distance customers. This is so because ILEC UNEs are already integrated into the ILEC network. Over time, these customers can be moved onto a CLEC's facilities, as they are constructed. But immediate availability of ILEC UNEs means the CLEC can compete for the customer at a time when that customer is soliciting bids.

Without access to ILEC UNEs, CLECs also would be impaired in their ability to provide competitive local exchange service on a ubiquitous basis. Even if it may be cost justifiable and feasible for competitors like Qwest to deploy facilities in some locations, few -- if any -- competitors would find it cost justifiable or feasible to deploy local facilities to serve every home and business in a given state or geographic market. If the Commission wants to see consumers everywhere -- whether business or residential -- have a wide range of choice for service provider, then it must recognize that competitors may be impaired under certain circumstances in ways that cannot be accounted for by absolute tests. 74/

74/ Once there is a wholesale market for a network element in an MTA, these concerns no longer exist.

E. Access to ILEC UNEs For All Business Customers Makes it Possible for CLECs to Establish the Customer Base Necessary to Permit Facilities Investment.

Qwest made clear in its comments that, given a choice between using its own facilities and using the ILECs' facilities, a competitor will nearly always choose to use its own. This is so because owning facilities gives a competitor control over its network and thus a greater ability to ensure service quality, control its own costs, and devise its own service offerings. Many competitors, however, cannot justify an investment in their own facilities until they have a sufficient customer base, or simply because particular areas and/or customers cannot support duplicate networks.. Thus, many entrants initially must rely, at least in part, on the use of ILEC UNEs.

An example from the long distance industry demonstrates this reality. In the 1980s, a competitor called LDDS entered the long distance market using a primarily resale strategy under which it focused on obtaining customers through superior marketing and cost control. It began deploying and acquiring network facilities only after accumulating a customer base sufficient to justify the investment in facilities. LDDS WorldCom continued to grow and invest, eventually acquiring MCI to become MCI WorldCom, a company with substantial local, long distance, and international facilities. The point is that the ILEC view that only the "inefficient" require UNE access is flawed in both theory and practice.

Competitors entering the local exchange market similarly need to be able to obtain a sufficient customer base before they can invest in their own facilities. To build a customer base, however, competitors need to be able to provide

differentiated service offerings at costs comparable to those of the ILEC, and, importantly, to provide the same full range of services (including access service) that the ILEC offers over these same facilities. The use of ILEC UNEs is the only strategy that makes this possible. Resale of the ILECs' retail services does not. Once a customer base is established, the carrier can begin deploying its own facilities. A lack of access to ILEC UNEs, therefore, could prevent a carrier from ever obtaining a customer base sufficient to justify more than a limited investment in facilities. 75/

VII. THE FCC SHOULD ESTABLISH A MINIMUM NATIONAL LIST AND PERMIT STATES TO ADD BUT NOT SUBTRACT UNES.

A. State-by-State Determinations of the UNEs that Must be Made Available Would Impose Massive Burdens on CLECs.

The ILECs have opposed the adoption of a mandatory national minimum list of network elements. Instead, most have suggested that the FCC should establish guidelines and then delegate to individual state commissions the task of determining whether a given network element should be made available in a given market. 76/ As made clear in Qwest's initial comments and in the comments of other parties (including many state commissions), however, state-by-state assessments of whether a network element must be made available to competitors

75/ See also, e.g., Competition Policy Institute at 22; RCN at 16; California Public Utilities Commission at 5.

76/ See, e.g., Ameritech at 66-67; BellSouth at 29-30; US West at 27, 29; SBC at 18-19.

would impose massive, and potentially prohibitive, burdens on many CLECs and are not necessary to achieve the goals of the Act or to conserve the Commission's resources. 77/

As the CLECs point out, it is essential that the FCC establish, in the first instance, a national minimum list of UNEs to which states may add, but from which states may not subtract. As discussed in our initial comments and as the Commission found in the Local Competition Order, uniform national rules:

- reduce administrative and litigation burdens for competitors;
- reduce the need for competitors to design multiple network configurations and market strategies for different jurisdictions;
- create efficiency and predictability for CLECs, thus facilitating entry and permitting sustained competition;
- address the unequal bargaining power between ILECs and new entrants more effectively than can multiple state rules;
- expedite and simplify not only fair negotiations among carriers, but also state arbitrations of interconnection agreements; 78/ and
- help the FCC, the Department of Justice, and the states to carry out their responsibilities under the 1996 Act. 79/

In addition to establishing a national minimum list of mandatory network elements, the FCC also should be responsible for determining when to take a UNE off the mandatory list. All of the commenting state commissions agree that

77/ Qwest at 40-42.

78/ Qwest at 38-39; Local Competition Order at ¶¶ 53-62.

79/ Qwest at 39-40; Local Competition Order at ¶ 57.

the FCC should establish either a minimum required list of UNEs or an initial presumptive list of UNEs. 80/ Five of the eleven commenting states, moreover, agree that while the FCC should permit states to add UNEs, it should not permit them to subtract UNEs. 81/

Delegating to the state commissions the job of determining whether impairment exists for each element would create enormous burdens for CLECs and for the state commissions as well. Such an approach could, at minimum, require CLECs to litigate the availability of *every* individual UNE in *every* individual state in which a CLEC wished to provide service. Litigation could become even more granular, potentially requiring CLECs to litigate the availability of different UNEs in individual localities, individual end offices, and even for the particular classes of customers a CLEC sought to serve. 82/

80/ Vermont Public Service Board at 4-5; Illinois Commerce Commission at 2; Kentucky Public Service Commission at 2, ¶ 2; see also Connecticut Department of Public Utility Control at 3; Texas Public Utility Commission at 2; Ohio Public Utilities Commission at 3; Iowa Utilities Board at 1-2; Florida Public Service Commission at 7; California Public Utilities Commission at 3; Washington Utilities and Transportation Commission at 3; New York Public Service Commission at 1-2; see also Oregon Public Utility Commission at 1.

81/ Vermont Public Service Board at 4-5; Illinois Commerce Commission at 2-4; Kentucky Public Service Commission at 2, ¶ 2; California Public Utilities Commission at 9 (a state could subtract from the UNEs that the state had added, but not from the FCC's mandatory minimum list of UNEs); see also Connecticut Department of Public Utility Control at 4.

82/ The ILECs suggest a variety of such granular determinations. See, e.g., SBC at 15-16 (city-by-city determinations), 17 (determinations based on the availability of competitively-supplied UNEs in "downtown business areas to serve high-capacity customers"), 19 (suggesting determinations based on "which business customers have 20 lines or more (thus qualifying them as 'large' customers)"); US West at 28-29 (presumptions based on metropolitan statistical areas ("MSAs"), 30 ("suggesting

The Ad Hoc Telecommunications Users Committee, which represents large users of competitive telecommunications services, also supports a national minimum list. Ad Hoc observes that a failure by the Commission to specify a national minimum list of UNEs would, “[i]n the most extreme scenario,” require “city block by city block determinations of whether alternatives to the ILECs’ network elements are available for service to particular customers.” 83/

A state-by-state approach also would create substantial uncertainty and risk for CLECs. As a result, this approach would increase the cost of capital for CLECs by making investors less willing to invest in their companies. In addition, such an approach would delay entry and wreak havoc with the ability of existing CLECs to compete.

B. The Act Indicates that Congress Intended the FCC, Not the States, to Determine Which UNEs Must be Made Available.

Some parties have suggested that the FCC should take the same approach with respect to determining the mandatory UNEs under Section 251(d)(2)

determinations based on wire centers or rate centers); USTA at 36 (“suburban and even rural markets need to be analyzed on a case-by-case basis” to determine the availability of loops) (recommending “geographically specific fact-finding” for some UNEs); Ameritech at 5-6 (determinations based on certain wire centers or central offices), 54 (“business cases are specific to the business conditions in an area; so should be the application of the necessary and impair standards”), 55 n. 130 (“the relevant geographic market for a loop is a point to point market because facilities that do not connect a particular end user to its serving wire center would be of no help . . .”); SBC at 42, 45, 50 (determinations based on certain wire centers); GTE at 10 (wire center serving 15,000 or more lines).

83/ Ad Hoc Telecommunications Users Committee at 12.

that it took in establishing the prices for UNEs under Section 252(d)(1). 84/
Specifically, these and other parties urge the FCC to establish the necessary and
impar standards, and then permit the states to apply them to establish an ILEC's
specific unbundling obligations within each state. 85/

A comparison of the UNE pricing mandates in Section 251(d)(2) and
the UNE designation mandates in Section 252(d)(1), however, shows that Congress
intended for the FCC, not state commissions, to develop a minimum list of UNEs.
The pricing language in Section 252(d)(1) indicates that while the FCC has the
authority to establish a pricing methodology that must be used by the states,
Congress intended the states to determine the specific rates for network elements.
Section 252(d)(1) states, in pertinent part, that "[d]eterminations by a *State*
commission of the . . . just and reasonable rate for network elements . . . shall be . . .
." 86/

The UNE designation language in Section 251(d)(2), by contrast,
indicates that Congress intended the *FCC* to make the baseline determination as to
what network elements ILECs must make available to competitors. Section
251(d)(2) states, in pertinent part, that "[i]n determining what network elements

84/ See Ohio Public Utilities Commission at 21; California Public Utilities
Commission at 10.

85/ Ohio Public Utilities Commission at 21; California Public Utilities
Commission at 10; Ameritech at 66-67; BellSouth at 29-30; US West at 27, 29; SBC
at 18-19.

86/ 47 U.S.C. § 251(d)(1).

should be made available for purposes of subsection 251(c)(3), *the Commission* shall consider . . .” 87/

The language in the adjacent Section 251(d)(3), moreover, supports this conclusion. Section 251(d)(3) provides, in pertinent part, that

[i]n prescribing and enforcing regulations to implement the requirements of this section the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission [that is consistent with this section and does not substantially prevent implementation of the requirements of this section and the purposes of this part of the Act]. 88/

This language indicates that while Congress intended the FCC to implement Section 251(d), Congress also contemplated a state ability to add access obligations consistent with Section 251(d) and with the FCC’s implementation of Section 251(d). Qwest therefore urges the Commission to confirm that the removal of UNEs from an FCC-established list would “substantially prevent implementation of the requirements of this section and the purposes of this part of the Act.” 47 U.S.C. § 251(d)(3).

An approach similar to that adopted for the pricing of network elements, therefore, would be inconsistent with the language in Section 251(d)(2). According to Section 251(d)(2), it is the FCC that should establish the minimum list of UNEs that must be made available to competitors.

87/ 47 U.S.C. § 251(d)(2).

88/ Id. § 251(d)(3).

C. The States Can Play an Important Role in Helping to Determine the UNEs that Must be Made Available.

All of the state commissions that submitted comments expressed concern that they be allowed to have some participation in the process of determining the required list of UNEs in given markets. Some state commissions noted that the states have strong familiarity with local market conditions. 89/

Qwest has proposed that the Commission establish a formal role for the state commissions. 90/ First, the states can play an important consultative and fact-finding role, similar to the role they play under Section 271, in determining whether and when the wholesale market test has been met. For example, the Commission could adopt rules under which the states would develop the factual record on the number of wholesale providers in a Major Trading Area ("MTA"), and thus advise the Commission on the question of whether a wholesale market has developed for a particular network element in a given MTA.

Second, as part of their obligation to arbitrate interconnection agreement disputes under Section 252(b), states commissions have the ability -- and indeed the duty -- to determine whether additional network elements should be made available by an ILEC. For example, as discussed in our initial comments, a requesting carrier that is denied access to a new capability of the ILEC network to which it seeks access may seek arbitration before the state commission of that

89/ See, e.g., Iowa Public Utilities Board at 2; Ohio Public Utilities Commission at 4.

90/ Qwest at 40-43.

denial. In arbitrating interconnection agreements, however, the states must apply the FCC's "necessary" and "impair" standards when considering the addition of network elements, as made clear in the Local Competition Order 91/ and as stated by several states in this proceeding. 92/

In addition, apart from the ability of states to add network elements under the federal act, state commissions have the authority to augment the FCC's mandatory list of UNEs pursuant to state law (where state law gives them that authority). In taking action under state law, state commissions are not bound to apply either the "necessary" and "impair" tests of the 1996 Act or the FCC's standards for doing so. State commissions do not have the power, however, to *remove* UNEs from the FCC's mandatory list, as such action would be equivalent to depriving requesting carriers of a federal right. 93/ As discussed in the preceding section, the removal of a UNE from the FCC-created list would undoubtedly violate Section 251(d)(3), which permits states to adopt access rules only if they do not "substantially prevent implementation of the requirements of this section and the purposes of this part of the Act."

91/ Local Competition Order at ¶ 244; 47 C.F.R. § 51.317.

92/ See, e.g., California Public Utilities Commission at 10; Iowa Utilities Board at 3; Texas Public Utility Commission at 3; Ohio Public Utilities Commission at 4-5.

93/ See Vermont Public Service Board at 4-5.

VIII. CLECS WOULD BE IMPAIRED WITHOUT ACCESS TO ILEC LOOPS, INCLUDING BROADBAND LOOPS.

A. ILECs Have Provided No Basis for the Commission to Limit the Availability of Unbundled Local Loops.

Although it would appear that the ability to employ the ILECs' unbundled loops should be obvious in a world in which there is only one network (the incumbent's) that reaches every customer, the ILECs nevertheless have asked the Commission to chip away at the ability of competitors to use those loops to provide competing service. Some ILECs would do that on a geographic basis; some would do that on the basis of the speed of the loop, the technology used, or other grounds not relevant to impairment. 94/

There is no basis for restricting access to any type of ILEC loop today. As CLEC commenters uniformly report, competitors absolutely rely on access to ILEC loops to compete on a broad basis with ILECs.

The ILECs' loop arguments bear the same infirmities as their arguments to restrict access to other network elements. They argue that competitors are beginning to construct their own alternative loop facilities, and that in some locations the presence of fiber optic ring facilities means that competitors need not rely on the ILEC to reach the customer premises. 95/ They also argue that if one CLEC has managed to construct alternative loop facilities, then others would

94/ See, e.g., GTE at 57-59; Ameritech at 100-102; Bell Atlantic at 37-38; SBC at 24-25; US West at 38-40; BellSouth at 63-75.

95/ See, e.g., US West at 38-40; Bell Atlantic at 37.

not be impaired without access to the ILEC loop. 96/ Additionally, they claim that other technologies, while not the same functionally as the ILECs', still eliminate impairment with respect to ILEC loops. 97/ These include, for example, the development of wireless local loop technology and the existence of broadband cable television plant. 98/

As with transport, switching, and other network elements, CLECs are beginning to invest in local loops. This bodes well, but it does not indicate a lack of impairment across the entire class of CLECs. As Sprint points out, these scattered investments do not make a ubiquitous footprint, even in the most dense geographic areas with the highest levels of CLEC investment. 99/ These investments also are not necessarily available to other CLECs. Nor is it possible, by any stretch of the imagination, for every CLEC to justify making such duplicate and costly investments -- particularly to serve a customer that has already been captured by another CLEC, as may be the case with many competitively-constructed loop facilities. Finally, the problems of dealing with multiple vendors identified in the transport context also operate here; even if there were CLECs who were interested

96/ See Bell Atlantic at 39.

97/ See, e.g., Ameritech at 103; Bell Atlantic at 36, 37-39; SBC at 25-29.

98/ See, e.g., Ameritech at 103; SBC at 28; BellSouth at 73-75.

99/ Sprint at 29; See also Covad at 35 (stating that the presence of fiber rings, broadband wireless, or upgraded cable plant are not substitutes for ILEC loop facilities).

in making their loop facilities available to their competitors, they could not offer anything like a ubiquitous ILEC loop product. 100/

In short, CLECs clearly would be impaired today without access to all ILEC loops.

B. CLECs Would Be Impaired Without Access to xDSL-Equipped Loops

The ILECs' opposition to making their loop facilities available to competitors is most vociferous with respect to those loops with broadband (high-speed) capabilities. These are precisely the types of loop facilities that Qwest most needs to bring the benefits of its high-speed, broadband intercity network to the customer. The state-of-the-art network and the innovative services that Qwest can provide over it would be stopped short at the last mile if the ILECs were permitted to deny competitors access to loops just because those loops had higher-speed capabilities. As the General Services Administration (GSA), a major purchaser of telecommunications services, explains:

Carriers are implementing significant network changes to facilitate provision of advanced telecommunications services through packet switched networks and digital subscriber line ("DSL") technologies. The minimum list of UNEs should accommodate these changes, or competitive LECs will be prevented from participating actively in the most rapidly growing telecommunications markets. 101/

100/ See Section X, below.

101/ GSA at 6.

The ILECs argue that competitors are not impaired by lack of access to advanced loops -- particularly xDSL-equipped loops 102/ -- because this is a “new market” which competitors have the same ability to enter and exploit as the incumbent. 103/ The ILECs ignore several critical factors that distinguish the CLECs’ participation in this market from the ILECs’. First, the ILEC enters this market with nearly 100 percent of the customer base already its own. Most CLECs, in contrast, have a tiny percentage of that market share, and are perceived by customers as a new, untested entity in the local arena. The effort required to convince a customer to sign up for another ILEC service is far less than the effort required to convince a customer to sign up with a new provider. In the absence of line sharing, moreover, the CLEC would have to convince the customer to pay for a second line or to switch its local voice service to the CLEC. 104/

Second, the ILECs ignore the difference between obtaining collocation in an ILEC central office as a CLEC versus already being in every one of those offices as an ILEC. Although the FCC’s collocation reforms will improve conditions when implemented, today, they are worlds apart.

102/ By xDSL-equipped loops we mean loops that have the DSL functionality because the ILECs have attached the necessary electronics (*i.e.*, DSLAMs) to those loops.

103/ See, *e.g.*, Ameritech at 118-119; BellSouth at 32; Bell Atlantic at 40-42.

104/ The ILECs generally oppose the FCC’s proposal to require sharing of the loop for DSL purposes. See generally In the Matter of Deployment of Wireline Service Offering Advanced Telecommunications Capability, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, FCC 99-48 (rel. Mar. 31, 1999) at ¶¶ 92-107.

Third, the ILECs ignore the unique scale and scope advantages possessed by the ILECs, which affect the costs of deploying xDSL technology, particularly if a carrier would like to provide competing service over a broad geographic area. Furthermore, additional barriers exist where IDLC architectures require that DSLAM deployment occur *outside* of the central office. Qwest discussed these point at length in its initial comments. 105/ The ILECs themselves acknowledged in the FCC's Advanced Services Proceeding the advantages of deploying DSL technology at the volumes they would likely enjoy, and on an integrated basis with their existing local network. 106/

Qwest, like other carriers with a nationwide presence, cannot provide xDSL service by collocating DSLAMs in every central office where they have a potential customer. MCI WorldCom, for example, which has invested substantially in competitive local facilities, states that it too would be impaired without access to the ILEC's xDSL-equipped loops. 107/

The fact that other CLECs, whose business plans involve DSL deployment only (which they are rolling out gradually on a market-by-market basis), do not believe that they are impaired without access to the ILECs' xDSL-equipped loops does not mean that other carriers, with a different footprint,

105/ See Qwest at 64-66.

106/ Id. (citing and quoting comments of US West and Bell Atlantic in the FCC's Advanced Services Proceeding, CC Docket No. 98-147).

107/ MCI WorldCom at 50.

customer base, and service profile, would not be impaired. 108/ This issue points out the real diversity among CLECs, and the fact that they each have relative strengths and weaknesses as they attempt to become local service providers. For example, the same “data CLECs” who do not believe themselves to be impaired without access to xDSL-equipped loops, do contend vigorously that they are impaired without access to the ILEC dedicated transport that they need to complete their networks. 109/ They also recognize, correctly, that where collocation space is limited, or where an ILEC deploys DLC technology, that they are impaired without access to xDSL-equipped loops. 110/

The point here is that each entrant chooses where to invest its limited capital and where it must rely on ILEC network elements. The FCC should not favor one entry strategy over another, or second-guess the investment decisions and resource allocations of entrants by denying access to network elements solely because one type of CLEC does not require them.

This is not to say, however, that a wholesale market could not develop for xDSL loops. As Qwest explained in its initial comments, there are DSL-oriented CLECs that would be interested in functioning as wholesalers of such loops. But their products today would not be interchangeable with the ILECs’ because of the

108/ See, e.g., RhythmsNet at 13-15 (seeking access to unbundled *clean* copper loops); NorthPoint at 18.

109/ See RhythmsNet at 19-20; NorthPoint at 19-20.

110/ See RhythmsNet at 15-16.

lack of nondiscriminatory collocation, the need for access to databases on conditioned loops, and so on. 111/ Only after these obstacles to interchangeability are removed, and a competitive wholesale market has developed, will the Commission be able to find that xDSL-equipped loops need no longer be considered a mandatory network element.

C. CLECs Also Need Access to Other Broadband Loops.

Just as CLECs would be impaired without access to xDSL loops, they would be impaired without access to other ILEC broadband loop facilities. 112/ The fact that CLECs have begun to construct fiber optic or wireless loop facilities in isolated locations does not mean that these facilities are in place everywhere there are potential customers, or that CLECs are interested in making those facilities available to other CLECs, or that these facilities are functionally the same as the ILECs' broadband facilities. The ILECs' ignore these obvious indicators of impairment. The ILECs also pretend (as they do with other elements) that the fact that one entrant has constructed a facility means that anyone can. 113/ This is not what the Supreme Court had in mind when it asked the Commission to consider whether ILECs had alternative sources of supply.

111/ See Qwest at 62-63.

112/ See, e.g., ALTS at 41-43 for a discussion of CLEC impairment without access to broadband loops.

113/ See Bell Atlantic at 39.

The ILECs' opposition to making all their loops available as network elements, in short, has little to do with impairment and a lot to do with the ILECs' desire to confine competition to old technology, old services, and low-revenue customers. The fact that the technology might be new, that the facilities or equipment might have been installed or activated after 1996, or that a facility involves packet- rather than circuit-switched technology, is all irrelevant to the impairment analysis, as the FCC made clear in its August 1998 Advanced Services Order. ^{114/} Qwest, like many other CLECs, would most definitely be impaired without access to ILEC broadband loops, including DS-1, DS-3, OC-n, and PRI. All of these capabilities are a prerequisite to meeting certain customer demands. ^{115/}

Qwest has the ability to provide customers everywhere in the nation with innovative, state-of-the-art packet-based broadband services and Internet-related offerings -- but not if it is stopped cold at the last mile, and told it must construct facilities to reach the customer even though the ILECs' facilities are already in place. Failure to permit CLECs to use the ILECs' broadband unbundled loops will stall the spread of competition and innovation in the provision of advanced services, contrary to Congressional intent, as embodied in Section 706 of

^{114/} See In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188 (rel. Aug. 7, 1998) Petition for review pending sub nom. U.S. West, Inc. v FCC, (D.C. Cir. No. 98-1410) at ¶¶ 11, 35, 40, 49.

^{115/} See, e.g., ALTS at 42.

the Act. Instead, it will only consolidate the ILECs' current market power as the network evolves and the services customers demand change.

IX. CLECS WOULD BE IMPAIRED BY A LACK OF ACCESS TO ILEC SWITCHES, INCLUDING SWITCH ROUTING TABLES.

A. CLECs Would be Impaired by a Lack of Access to ILEC Circuit Switches.

The ILECs point to the fact that a number of CLECs have invested in local circuit switches as evidence that CLECs are not "impaired" in their ability to provide competing local service without access to ILEC switching. 116/ The ILECs also point to the availability of circuit switches from non-ILEC sources. 117/ Several parties make clear that the ILECs' assertions in this regard are incorrect. 118/

In addition, the ILECs fail to appreciate the critical differences between obtaining local switching from the ILEC and obtaining switching through a

116/ See, e.g., Ameritech Comments at 70-78; SBC Comments at 34-38; Bell Atlantic Comments at 20-21, 22-24; US West Comments at 42-45; BellSouth Comments at 58-60; GTE Comments at 39-42; see also USTA Comments at 35.

117/ See, e.g., Ameritech Comments at 80-83; SBC Comments at 39-40, 41-42; USTA Comments at 34-35; US West Comments at 46; BellSouth Comments at 57, 58; GTE Comments at 43-46, 47-48.

118/ E.g., CompTel Comments at 39; TRA Comments at 34-35; Sprint Comments at 29-30; Competitive Policy Institute Comments at 20; Corecomm Comments at 27-28; KMC Comments at 15-16; Choice One, Network Plus, GST, CTSI, and Hyperion Joint Comments at 16-17; Net2000 Comments at 13-14.

competitively supplied (or self-supplied) local switch. 119/ Thus, the ILECs completely miss the fundamental problem with competitively-supplied switches: they do not provide the same functionality as ILEC switching because they are not generally already connected to the ILEC local loop (and interoffice transport network), unlike the ILEC switching element. Put differently, competitively supplied switching is not “interchangeable” with ILEC switching.

Achieving interchangeability requires implementing operational reforms, such as the development of electronic cross-connect systems that would make the process of disconnecting and reconnecting ILEC loops to CLEC switches a software-based process (comparable to the process used by the ILECs to change a customer’s service from one customer premises to another using ILEC switches).

For now, however, the use of competitively-supplied switches imposes substantial costs, limitations, difficulties, and delays on competitors not imposed by the use of ILEC switches. This is so, in large part, because competitive switches continue to require manual work to (1) disconnect each customer’s loop from the ILEC switch and (2) re-connect it to the CLEC’s facilities. They also require the purchase of transport to haul the loop back to the CLEC switch (or the purchase of an extended loop). 120/

119/ See, e.g., Ameritech Comments at 69-83; SBC Comments at 33-42; USTA Comments at 34-35; Bell Atlantic Comments at 20-26; US West Comments at 42-46; BellSouth Comments at 55-62; GTE Comments at 39-48.

120/ MCI Comments at 51.

As discussed in detail by AT&T, Sprint, MCI Worldcom, and other parties, 121/ the problems created by the manual conversions necessary with the use of competitively-supplied switches (“hot cut” problems) include:

- delays caused by the need to obtain central office space and coordinate the installation of collocated facilities with the ILEC (despite the FCC’s important efforts to minimize these delays);
- delays associated with the manual work of cross-connecting the loop and port network elements for each converted customer;
- an increased risk of human error and consequent service outages arising from the need for manual cross-connects, and a resulting overall reduction in the service quality and reliability that customers associate with the CLEC rather than the ILEC;
- a reduction in the number of customers that can be converted to a competitor, commonly referred to as a “gating factor;”
- increased non-recurring charges associated with provisioning individual network elements; and
- increased costs associated with installing collocated facilities and manually cross-connecting the loop and port network elements.

AT&T, Sprint, MCI Worldcom, and others describe in detail the difficulties, delays, and limitations associated with using competitively-supplied switches. 122/ These parties also demonstrate the substantial added costs of using

121/ AT&T Comments at 93-97, 100-08; Sprint Comments at 30, 31; MCI Worldcom Comments at 52; CompTel Comments at 39, 40; see also Competition Policy Institute Comments at 21.

122/ AT&T Comments at 93-97, 100-08; Sprint Comments at 30, 31; MCI WorldCom Comments at 52; CompTel Comments at 39, 40; see also Competition Policy Institute Comments at 21; Choice One, Network Plus, GST, CTSI, and Hyperion Joint Comments at 16.

competitively-supplied switches. 123/ Notably, AT&T demonstrates that, in New York for example, “it would take a CLEC more than 5 years to recoup just [a] portion of the upfront customer-specific costs of extending the customer’s unbundled loop to the switch.” 124/

Additional costs identified by AT&T of forcing CLECs to use competitively-supplied network elements, moreover, are the costs imposed by the need to deploy switches without knowing who their customers will be and what those customers’ traffic patterns are likely to be. 125/ These costs, again, are costs not incurred by the ILECs because the ILECs’ historic control over the local exchange networks has made this information readily available to them. The ability to use ILEC switches and other ILEC UNEs, conversely, would enable CLECs to gauge consumer demand and traffic patterns before deploying facilities.

While the added delays, difficulties, limitations, and costs of using competitively-supplied switches may be something a CLEC can live with for certain customers in certain locations, there will be many customers and many CLECs for

123/ AT&T Comments at 94; Sprint Comments at 30, 31; MCI WorldCom Comments at 52; see also CompTel Comments at 39; Cable & Wireless USA Comments at 36. As indicated above, the ILECs generally do not discuss these problems. Only one ILEC, BellSouth, appears to have addressed the manual connection or “hot cut” issue at all, and BellSouth’s only response to these problems was to assert, in essence, that no CLECs should have access to ILEC switching because all CLECs should suffer these same disadvantages. BellSouth Comments at 61-62.

124/ AT&T Comments at 94.

125/ AT&T Comments at 97.

whom the balance will be struck the other way -- with the result that the CLEC cannot serve the customer at all. Until operational reforms are implemented to make competitively-supplied switches interchangeable with ILEC switches, the use of competitively-supplied switches will impair the ability of competitors to serve the customers they wish to serve.

In addition to ignoring the differences between ILEC and CLEC switching, the ILECs also suggest that CLECs will not be impaired because a single local switch purchased from an alternative source can be used to serve a large geographic area. 126/ The substantial added costs associated with using a switch to serve distant customers, however, do not enter into the ILECs' analysis. The farther a customer is from a switch, the more it costs to serve that customer. This is so because the rates for transport, whether purchased as a UNE or in the form of special access service from the ILEC, are generally distance-sensitive. 127/ Thus, the farther a customer is from the ILEC central office, the larger the customer must be to justify the costs of transporting traffic to and from a CLEC's switch.

126/ See, e.g., Ameritech Comments at 78-79; SBC Comments at 38-39; USTA Comments at 35; US West Comments at 44, 45; BellSouth Comments at 58; GTE Comments at 46 Bell Atlantic at 21-22. The ILECs also note that, in some instances, CLECs have not made many requests for unbundled switching. US West Comments at 43; Ameritech Comments at 71; BellSouth Comments at 60.

127/ Indeed, the ILECs have argued that transport should continue to be priced at distance sensitive rates.

At least nine of the eleven states that filed comments agree that switching should remain on the FCC's Rule 319 list network elements. 128/ The Kentucky Public Service Commission ("PSC"), for instance, notes the critical importance of access to the seven originally-listed network elements, including ILEC switching, for those CLEC that need access to the UNE platform. As the Kentucky PSC states, "local competition will not occur unless key UNEs are available on a platform basis." 129/ The Kentucky PSC also states that

[r]equiring a competitor to purchase one of [the original seven] UNEs from a provider other than the ILEC would contradict the Act's provision, at Section 251(c)(3), requiring an ILEC to permit competitors to provide service solely through use of an ILEC's facilities. Further, by allowing an ILEC the right to separate UNEs (*the inevitable result of requiring CLECs to go to third parties to obtain UNEs*) the Commission would render meaningless a CLEC's right to obtain the unbundled network element platform. 130/

MCI WorldCom's use of the unbundled network element platform ("UNE platform") in the New York local exchange market demonstrates that access to the ILEC unbundled switching element is essential for CLEC entry on a high-

128/ California Public Utilities Commission Comments at 4,5; Iowa Utilities Board Comments at 6-7, 8; Kentucky Public Service Commission Comments at 2, ¶¶ 2, 3; Illinois Commerce Commission Comments at 11, 12-13; Connecticut Department of Public Utility Control Comments at 4, 5; Washington Utilities and Transportation Commission Comments at 11; Texas Public Utility Commission Comments at 14; New York Public Service Commission Comments at 2, 4; Florida Public Service Commission Comments at 7.

129/ Kentucky Public Service Commission Comments at 2, ¶ 3.

130/ Id. (emphasis added).

volume, commercial scale. 131/ In the first two and a half years after Congress enacted the 1996 Act, the Eighth Circuit's decision in Iowa Utilities Board v. FCC enabled Bell Atlantic-NY to prevent MCI WorldCom from obtaining access to the UNE platform in New York. 132/ Thus, MCI WorldCom was forced to provide service in New York using unbundled loops and its own switching. During that time, all CLECs in New York had -- collectively -- signed up only 49,442 unbundled loops in the local exchange market. 133/ In the *four months* since the UNE platform became available in New York, by contrast, MCI WorldCom alone has signed up 75,000 customers for its UNE-platform-based local exchange service offering. 134/ Moreover, access to the UNE platform has permitted MCI Worldcom to do so despite problems such as continuing difficulties with Bell Atlantic's OSS. 135/

131/ MCI Worldcom Comments at 52-53.

132/ A lack of CLEC requests for unbundled switching, therefore, is not surprising since a switch is only useful if purchased in combination with other network elements, and until the Supreme Court issued its decision in AT&T v. Iowa Utilities Board, CLECs have not been able to purchase UNEs in combination from the ILECs.

133/ Responses to the FCC's Fourth Voluntary Local Competition Survey (data as of Dec. 31, 1998), at 321 (response of Bell Atlantic regarding New York), available at <www.fcc.gov/ccb/local_competition/survey4/responses>.

134/ "MCI WorldCom Claims Local Success in N.Y. Despite OSS Problems," Telecommunications Reports, June 3, 1999, at 9.

135/ "MCI WorldCom Claims Local Success in N.Y. Despite OSS Problems," Telecommunications Reports, June 3, 1999, at 9; MCI Worldcom Comments at 52-53.